

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATIONAL FLOOD SERVICES, INC., a
Delaware corporation, and FISERV, INC., a
Wisconsin corporation,

Plaintiffs,

v.

TORRENT TECHNOLOGIES, INC., a
Delaware corporation, TRAVIS PINE and
SUSANNA PINE, and their marital
community; THERESA N. JOHNSTON and
RALPH JOHNSTON, and their marital
community,

Defendants.

No. C05-1350Z

ORDER

I. INTRODUCTION

This matter comes before the Court on Plaintiffs' Motion to Dismiss Counterclaims I-IV, docket no. 14. The Court has considered the briefs in support of and in opposition to the motion, and heard oral argument on May 5, 2006. At the conclusion of oral argument, the Court GRANTED Plaintiffs' Motion to Dismiss Counterclaims I-IV, docket no. 14. This Order explains the basis for the Court's decision.

1 **II. BACKGROUND**

2 **A. Present Action and Present Motion**

3 National Flood Services, Inc. (“NFS”) and Fiserv, Inc. (“Fiserv”) bring this lawsuit
 4 against two of NFS’s former employees, Travis Pine (“Pine”) and Theresa N. Johnston
 5 (“Johnston”), and against Torrent Technologies, Inc. (“Torrent”), alleging, in part, that Pine
 6 and Johnston breached employment contracts when they left NFS to form Torrent. Am.
 7 Compl., docket no. 7, ¶¶ 103-112. Defendants Pine and Torrent set forth eleven
 8 counterclaims in Defendants’ Answer to Plaintiffs’ Amended Complaint. Answer,
 9 Affirmative Defenses, Counterclaims, and Jury Demand, docket no. 9, at 16-32.¹ Plaintiffs
 10 moved to dismiss Counterclaims I-IV, which allege: (I) restraint of trade in violation of
 11 Section 1 of the Sherman Act; (II) monopolization in violation of Section 2 of the Sherman
 12 Act; (III) attempt to monopolize in violation of Section 2 of the Sherman Act; and (IV)
 13 violation of state antitrust, monopolization, unfair competition, and restraint of trade laws.
 14 Counterclaims, docket no. 9, ¶¶ 36-56.

15 **B. Factual Background**²

16 **1. Flood Vendors**

17
 18 ¹ The portion of the Answer containing the Counterclaims is referred to hereinafter as
 19 “Counterclaims.”

20 ² For the purposes of Plaintiffs’ motion to dismiss, the Court has accepted all factual
 21 allegations plead in Defendants’ Counterclaims as true. In addition to facts alleged in the
 22 Counterclaims, the Court has considered Defendants’ Answer, which Defendants expressly
 23 incorporated into their Counterclaims, see Counterclaims at 16, together with the
 24 employment contracts attached as Exhibits A-H to Plaintiffs’ Amended Complaint, docket
 25 no. 7, and the “Executive Summary” attached as Exhibit N to Plaintiffs’ Amended
 26 Complaint. The Court DENIES Defendants’ Motion to Strike, docket no. 18, at 23, because
 the Court does not strike arguments made in a party’s briefing. Nonetheless, the Court
 makes clear that, for the purposes of this motion, the Court does not take Plaintiffs’
 allegations in Plaintiffs’ Amended Complaint, docket no. 7, as true. The parties dispute
 whether Plaintiffs’ motion to dismiss relies on facts outside of the pleadings and whether the
 motion must be converted to one for summary judgment. The Court declines to convert the
 motion to a summary judgment motion.

This case involves businesses that operate in the flood insurance market. Specifically, Fiserv/NFS³ is a flood vendor. Id. ¶¶ 7, 44. A “flood vendor” is a third-party administrator who provides policy and claims servicing to private insurance companies – called Write Your Own (“WYO”) insurance companies – that sell flood insurance under the federal National Flood Insurance Program (“NFIP”). Id. ¶¶ 5-6. Approximately 89% of WYO insurance companies use a flood vendor. Id. ¶ 6. Policy and claims servicing includes processing insurance applications, collecting initial premiums, issuing policies, providing lender notification, providing ongoing premium billing and collection, providing customer support to both agents and insureds, maintaining policy and claims records, processing and paying claims, and reporting statistical data to the Federal Emergency Management Agency (“FEMA”). Id. ¶ 6. Flood vendor services are specialized because of the specific requirements of flood insurance as established by FEMA. Id. ¶ 10. The highly-regulated nature of the flood insurance industry creates barriers to entry into the market. Id. ¶ 12. Torrent is a start-up company that is attempting to enter the flood vendor market to provide flood insurance servicing in competition with Fiserv/NFS. Id. ¶ 8.

2. Plaintiffs’ Anticompetitive Strategy

In support of Counterclaims I-IV, Defendants allege that Fiserv/NFS is engaged in a series of anticompetitive strategies to monopolize and restrain competition in the flood vendor market and to eliminate Torrent as a competitor. See, e.g., id. ¶¶ 17-19, 27-29, 46. These strategies include: (a) acquiring competitors, id. ¶ 17; (b) usurping Torrent’s intellectual property, id. ¶¶ 19-26, 34, 38-39; (c) filing repetitive and baseless claims against Torrent to drain its resources, id. ¶¶ 27, 35; (d) extracting unreasonable and unenforceable

³ NFS is a wholly-owned subsidiary of Fiserv. Pls.’ Answer to Counterclaims, docket no. 15, at 2 (admitting Counterclaims ¶ 2). The Order refers to Plaintiffs as “Fiserv/NFS” to be consistent with the allegations in Defendants’ Counterclaims.

1 contracts from employees to prevent competition, id. ¶¶ 18, 28-29, 37, 39; and (e) attempting
2 to obtain Torrent's confidential and proprietary development materials. Id. ¶ 30.

3 **a. Acquiring Competitors**

4 The first component of Plaintiffs' alleged anticompetitive strategy is Plaintiffs'
5 acquisition of competitors. Fiserv/NFS has purchased several of its primary competitors,
6 namely National Con-Serv, Inc. ("NCSI") and Insurance Management Solutions Group, Inc.
7 ("IMSG"). Id. ¶ 17. Through these and other acquisitions, Fiserv/NFS has succeeded in
8 eliminating most of its competition in the flood vendor market. Id. Fiserv/NFS is the
9 exclusive provider of flood vendor services to approximately 93% of WYO insurance
10 companies who use outside administrative services. Id. ¶¶ 11-12.

11 **b. Usurping Torrent's Intellectual Property**

12 The second component of Plaintiffs' alleged anticompetitive strategy is Plaintiffs'
13 attempt to usurp ownership of Torrent's intellectual property. In July 2005, Fiserv/NFS
14 obtained a copyright registration for a document entitled "Executive Summary," which was
15 written by Pine and which describes Torrent's business model and its planned technology.
16 Id. ¶¶ 20-22. Fiserv/NFS obtained the registration by making fraudulent representations to
17 the United States Copyright Office. Id. ¶¶ 22-23. Fiserv/NFS has never used the
18 copyrighted work and its primary purpose in procuring the copyright was to create a basis for
19 a copyright claim against Torrent in this lawsuit and to deny Defendants their lawful right to
20 register the document. Id. ¶¶ 21, 24. Fiserv/NFS's attempted enforcement of the
21 improperly-obtained copyright is part of its anticompetitive strategy to prevent Torrent, and
22 others, from entering the flood vendor market. Id. ¶¶ 25-26, 38-39. Torrent has been
23 damaged by Fiserv/NFS's illegitimate assertion of copyright in Torrent's Executive
24 Summary. Id.
25 ¶ 34.
26

1 **c. Filing Repetitive and Baseless Claims Against Torrent**

2 The third component of Plaintiffs' alleged anticompetitive strategy is Plaintiffs' filing
3 of repetitive and baseless claims against Torrent in an effort to drain Torrent of economic
4 resources. In May 2005, Fiserv/NFS filed a complaint and a petition for a temporary
5 restraining order ("TRO") in King County Superior Court. Id. ¶ 27. King County Superior
6 Court denied the TRO. Id. In August 2005, Fiserv/NFS filed the present lawsuit in federal
7 court, presenting claims that substantially overlap with the claims pending in state court. Id.
8 Fiserv/NFS's initiation of the present lawsuit is causing irreparable injury to Defendants and
9 adversely affecting Defendants' ability to compete and to sell its products and services in the
10 marketplace. Id. ¶ 35.

11 **d. Extracting Unreasonable and Unenforceable Contracts from**
12 **Employees**

13 The fourth component of Plaintiffs' alleged anticompetitive strategy is Plaintiffs' use
14 of unreasonable and unenforceable employment contracts to prevent competition.
15 Fiserv/NFS forces employees of the over one hundred companies owned by Fiserv to enter
16 into contracts that restrict competition with any Fiserv company and restrict the use of
17 confidential information. Id. ¶¶ 18, 28. These contracts constrain future competitors of
18 Fiserv/NFS by preventing legitimate competition by any person who has ever worked for
19 Fiserv/NFS. Id. ¶¶ 18, 29. These contracts are not ancillary to any legitimate business
20 purpose or transaction and are not necessary to protect Fiserv/NFS's legitimate property
21 interests. Id. ¶ 29.

22 In particular, Pine and Johnston entered into two employment contracts with
23 Fiserv/NFS: (1) the "Employee Confidential Information and Development Agreement"
24 (referred to hereinafter as the "Confidentiality Agreement"), see Am. Compl., Exs. A-D,⁴ and
25

26 ⁴ The Confidentiality Agreements signed by Pine on September 6, 2001, and on January 13, 2003, are attached to the Amended Complaint as Exhibits A and B, respectively. The

(2) the “Employee Non-Qualified Stock Option Agreement” (referred to hereinafter as the “Option Agreement”), see Am. Compl., Exs. E-H.⁵ Counterclaims ¶¶ 28, 37. At oral argument, Defendants clarified for the Court that these two agreements are the sole agreements at issue in Defendants’ Counterclaims I-IV.⁶

The Confidentiality Agreement, in part, prohibits the disclosure of certain confidential information during and after the employee’s employment, requires the return of certain Fiserv property upon the employee’s termination of employment, assigns certain intellectual property rights created within the scope of employment to Fiserv, and prohibits the employee from engaging in any activity that creates a conflict of interest with Fiserv’s interests. See, e.g., Am. Compl., Exs. A-D, ¶¶ 1, 4 and 10 (paraphrased). The Option Agreement, in part, grants the employee stock options on the condition that the employee restrict his or her interactions with clients, prospective clients, and employees of any Fiserv Group Company in certain ways for a period of twelve months after the termination of the employee’s employment with Fiserv or any subsidiary of Fiserv. See, e.g., Am. Compl., Exs. E-H, ¶¶ 1, 4(d) (paraphrased).

(e) **Attempting to Obtain Torrent’s Confidential and Proprietary Development Materials**

Fiserv/NFS demanded that Torrent hand over to Fiserv/NFS all of Torrent’s computers and proprietary development materials. Id. ¶ 30. Fiserv/NFS is pursuing efforts to develop technologies that would mimic Torrent’s technologies. Id.

Confidentiality Agreements signed by Johnston on December 5, 2001, and on January 16, 2003, are attached as Exhibits C and D, respectively.

⁵ The Option Agreements signed by Pine on February 11, 2003, and on February 18, 2004, are attached to the Amended Complaint as Exhibits E and F, respectively. The Option Agreements signed by Johnston on February 11, 2003, and on February 18, 2004, are attached as Exhibits G and H, respectively.

⁶ See also Defs.’ Resp. at 9.

3. Anticompetitive Injury

As a result of Fiserv/NFS's anticompetitive conduct, the consumers and potential consumers of Fiserv/NFS's flood vendor services: (a) are forced to use a weak and outdated product, and (b) pay higher prices for flood vendor services than they would in the absence of Fiserv/NFS's anticompetitive conduct. Id. ¶ 13; see also ¶¶ 14-15 (alleging the antiquated nature of Fiserv/NFS's technology). Defendants further allege that "Fiserv/NFS's anticompetitive conduct has and will continue to harm competition generally in the relevant market," id. ¶ 31; that "if Fiserv/NFS's conduct is permitted to continue, the flood insurance industry itself is at great risk" because "Fiserv/NFS's systems infrastructure is vulnerable due to its antiquated foundation, without adequate backup and disaster recovery measures in place," id. ¶ 32; that "Fiserv/NFS's unreasonable, illegitimate, predatory, and anticompetitive conduct has caused injury to competition in the relevant market and to Torrent," id. ¶ 33; that Fiserv/NFS's anticompetitive conduct has damaged Torrent and adversely affected its ability to compete, id. ¶¶ 34-35; that Fiserv/NFS's anticompetitive conduct "has and will continue to actually injure competition, beyond the impact on Torrent's business, and within the flood vendor market by preventing the entry into the market of Torrent and other actual or potential competitors of Fiserv/NFS," id. ¶ 40; that Fiserv/NFS's anticompetitive conduct "has caused injury to Torrent, as well as injury to competition in the relevant market," id. ¶¶ 42, 47, 52 and 56; and that Fiserv/NFS's anticompetitive conduct is an attempt "to destroy a nascent company so as to prevent and eliminate competition in the flood vendor market," id. ¶ 49.

III. DISCUSSION

A. Motion to Dismiss Standard Under FED. R. CIV. P. 12(b)(6)

Plaintiffs move under Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Defendants' antitrust counterclaims for failure to state a claim upon which relief may be granted. "A complaint should not be dismissed for failure to state a claim unless it appears

1 beyond doubt that the [claimant] can prove no set of facts in support of his claim which
2 would entitle him to relief.” Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 746
3 (1976). The Court accepts all factual allegations plead in Defendants’ Counterclaims as true,
4 and resolves any doubts in favor of the pleader. See Everest and Jennings, Inc. v. Am.
5 Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994).

6 **B. Sherman Act**

7 Defendants’ Counterclaims I-III allege violations of the Sherman Act under 15 U.S.C.
8 § 1 (“Section 1”) and 15 U.S.C. § 2 (“Section 2”). The purpose of the Sherman Act is to
9 preserve “free and unfettered competition” in the marketplace. Northern Pac. Ry. v. United
10 States, 356 U.S. 1, 4 (1958). The Sherman Act “rests on the premise that the unrestrained
11 interaction of competitive forces will yield the best allocation of our economic resources, the
12 lowest prices, the highest quality and the greatest material progress.” Id.

13 **1. Section 1 of the Sherman Act (Counterclaim I)**

14 Defendants allege a violation of Section 1 of the Sherman Act, which provides:
15 “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of
16 trade or commerce among the several states, or with foreign nations, is declared to be
17 illegal.” 15 U.S.C. § 1. To allege a claim under Section 1, Defendants must allege three
18 elements: “(1) an agreement, conspiracy, or combination among two or more persons or
19 distinct business entities; (2) which is intended to harm or unreasonably restrain competition;
20 and (3) which actually causes injury to competition, beyond the impact on the claimant,
21 within a field of commerce in which the claimant is engaged (i.e., ‘antitrust injury’).”
22 McGlinchy v. Shell Chem. Co., 845 F.2d 802, 811 (9th Cir. 1988).

a. **“Contract, Combination . . . or Conspiracy”**

A Section 1 conspiracy requires “an agreement among two or more persons or distinct business entities.” United States v. Hughes Aircraft Co., 20 F.3d 974, 979 (9th Cir. 1994). “Section 1 of the Sherman Act . . . reaches unreasonable restraints of trade effected by a contract, combination or conspiracy between separate entities. It does not reach conduct that is wholly unilateral.” Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768 (1984). “Had Congress intended to outlaw unreasonable restraints of trade [effected by a single firm], § 1’s requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of § 2.” Id. at 775.

Defendants’ Counterclaim I does not mention the words “contract,” “combination” or “conspiracy.” See Counterclaims ¶¶ 36-42. Defendants’ Counterclaim I merely alleges that “anti-competitive agreements” and “copyright misuse” form the basis for Plaintiffs’ Section 1 violation. Counterclaims ¶¶ 37-39.⁷ Plaintiffs’ motion to dismiss argues that the “anti-competitive agreements” and “copyright misuse” do not violate Section 1 of the Sherman Act because there is no “contract,” “combination” or “conspiracy.” See Pls.’ Mot., docket no. 14, at 7-8 and 18.⁸

First, Plaintiffs argue that the “anti-competitive agreements” alleged in Defendants’ Counterclaim I do not involve an actionable conspiracy because “a conspiracy is not possible

⁷ In a section of Defendants’ brief in response to Plaintiffs’ motion to dismiss entitled, “The non-compete agreements are not ‘wholly unilateral,’” Defendants argue that Plaintiffs “acquired competitor businesses as part of an anti-competitive scheme.” Defs.’ Resp., docket no. 18, at 11-12. Plaintiffs’ alleged acquisitions, set forth in Counterclaims ¶ 17, have nothing to do with the “non-compete agreements.” Nor have Defendants alleged that Plaintiffs’ acquisitions constitute a Section 1 conspiracy between Fiserv/NFS and other companies to carry out anticompetitive goals.

⁸ Plaintiffs also argue that NFS cannot conspire with Fiserv because NFS is a wholly-owned subsidiary of Fiserv. Pls.’ Mot. at 8. While this is true, see Copperweld, 467 U.S. at 771, Defendants’ Counterclaim I does not allege a conspiracy between NFS and Fiserv. See Counterclaims ¶¶ 36-42; Defs.’ Resp. at 12.

1 as a matter of law between a corporation and its employees unless those employees have an
2 independent personal stake and a stand to benefit from conspiring to restrain trade.” Pls.’
3 Mot. at 8. The general rule is that employees cannot conspire with their employer.
4 Copperweld, 467 U.S. at 769 (“officers or employees of the same firm do not provide the
5 plurality of actors imperative for a § 1 conspiracy”). However, some circuits have held that
6 there is an exception to this rule if an employee has an “independent personal stake” in the
7 conspiracy to restrain trade. See, e.g., Motive Parts Warehouse v. Facet Enters., 774 F.2d
8 380, 387 (10th Cir. 1985); H & B Equip. Co. v. Int’l Harvester Co., 577 F.2d 239, 244 (5th
9 Cir. 1978); Greenville Publ’g Co. v. Daily Reflector, Inc., 496 F.2d 391, 399-400 (4th Cir.
10 1974); but see Nurse Midwifery Assocs. v. Hibbett, 918 F.2d 605, 615 (6th Cir. 1990)
11 (declining to adopt exception). An “independent personal stake” exists when “the employees
12 had interests in economic entities separate from the principal defendant.” Int’l Harvester,
13 577 F.2d at 244. For example, in Motive Parts, where the defendant, an automotive parts
14 supplier, created independent franchises to distribute its products and sold the franchises to
15 its employees, the employees could have an independent stake to conspire with the defendant
16 on behalf of their franchises. See Motive Parts, 774 F.2d at 388. In Greenville, the president
17 of a newspaper company could have an independent stake when he had an interest in another
18 newspaper, and he stood to benefit by pushing the plaintiff competitor out of the market. See
19 Greenville, 496 F.2d at 400.

20 The Ninth Circuit has never expressly adopted the independent personal stake
21 exception to the general rule that employees cannot conspire with their employer. In the one
22 Ninth Circuit case that referred to the independent personal stake exception, the facts were
23 inconsistent with the exception. See Calculators Hawaii, Inc. v. Brandt, Inc., 724 F.2d 1332,
24 1336 n.1 (9th Cir. 1983). Even if the Court assumes that this exception applies in the Ninth
25 Circuit, Counterclaim I fails to allege any “independent personal stake.” Furthermore, the
26

1 facts alleged in the Counterclaims do not support an “independent personal stake” under the
2 law of any Circuit.

3 Defendants argue that the Option Agreement gave employees who signed such an
4 agreement an independent personal stake in a conspiracy to restrain trade. The Option
5 Agreement allowed Pine and Johnston, and other similarly situated employees, to receive
6 stock if they did not violate the non-disclosure and non-solicitation provisions of the
7 agreement. See Am. Compl., Exs. E-H (Option Agreement) at 2-3, ¶¶ 4(d), 4(e). The
8 Option Agreement did not, however, give the employees an interest in an economic entity
9 separate from Fiserv/NFS. See Int’l Harvester Co., 577 F.2d at 244 (no independent
10 personal stake where benefit to employee was “indistinguishable from other forms of
11 compensation, such as salary”). Defendants have cited no case that indicates the risk of an
12 employee losing stock options in its employer’s company can create an “independent
13 personal stake” that would give rise to antitrust liability. Therefore, the general rule that an
14 employee cannot conspire with his or her employer applies to the present case, and the “anti-
15 competitive” agreements alleged in Counterclaim I fail to satisfy the conspiracy element of
16 Section 1 of the Sherman Act.⁹

17 Second, Plaintiffs argue that the “copyright misuse” alleged in Defendants’
18 Counterclaim I does not involve an actionable conspiracy because “Fiserv and NFS cannot
19 conspire with the U.S. Copyright Office” as a matter of law. Pls.’ Mot. at 18. Defendants
20 failed to respond to Plaintiffs’ argument. Defendants’ failure to respond is considered by the
21 Court as an admission that the argument has merit. See Local Rule CR 7(b)(2).
22 Accordingly, the Court concludes that Defendants have failed to allege a Section 1
23 conspiracy involving Plaintiffs’ alleged “copyright misuse.”
24

25 ⁹ The Court rejects Defendants’ argument under Betz Labs., Inc. v. Desmaretz, 1985 U.S.
26 Dist. LEXIS 22830 (N.D. Ill. 1985), that the plurality requirement does not apply to the
“anti-competitive agreements” in the present case.

b. Conclusion (Counterclaim I)

Defendants failed to sufficiently allege the “conspiracy” element of a Section 1 Sherman Act claim.¹⁰ Thus, the Court GRANTED Plaintiffs’ motion to dismiss Defendants’ Counterclaim I for failure to state a claim upon which relief can be granted.

2. Section 2 of the Sherman Act (Counterclaims II and III)

Defendants’ Counterclaims II and III allege violations of Section 2 of the Sherman Act, which provides, in pertinent part: “Every person who shall monopolize, or attempt to monopolize . . . any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.” 15 U.S.C. § 2. The Clayton Act makes this provision enforceable by “any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws.” 15 U.S.C. § 15. Counterclaim II alleges “monopolization” under Section 2, whereas Counterclaim III alleges an “attempt to monopolize” under Section 2.

To state a “monopolization” claim under Section 2, Defendants must allege three elements: “(1) the possession of monopoly power in the relevant market . . . (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident,” Eastman Kodak Co. v. Image Technical Servs. Inc., 504 U.S. 451, 481-82 (1992) (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966)), and (3) antitrust injury. See Cost Mgmt. Servs., Inc. v. Washington Natural Gas Co., 99 F.3d 937, 949 (9th Cir. 1996); Image Technical Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997); Seattle Totems Hockey Club, Inc. v. National Hockey League, 783 F.2d 1347, 1350 (9th Cir. 1986).

¹⁰ The Court does not decide whether Defendants have sufficiently alleged the other elements of a Section 1 Sherman Act violation; however, the Defendants’ failure to plead “antitrust injury,” as the Court discusses in the context of Defendants’ Section 2 Sherman Act claims, would be an alternative ground for the Court’s dismissal of Defendants’ Section 1 Sherman Act claim.

1 To state an “attempt to monopolize” claim under Section 2, Defendants must allege four
 2 elements: “(1) a specific intent to control prices or destroy competition; (2) predatory or
 3 anticompetitive conduct directed at accomplishing that purpose; (3) a dangerous probability
 4 of achieving ‘monopoly power,’ and (4) causal antitrust injury.” Image Technical Servs.,
 5 125 F.3d at 1202. The requirements for Section 2 monopolization and attempted
 6 monopolization claims “are similar, differing primarily in the requisite intent and the
 7 necessary level of monopoly power.” Id. Plaintiffs move to dismiss Defendants’ Section 2
 8 Counterclaims II and III based on Defendants’ failure to sufficiently plead antitrust injury.

9 **a. Antitrust Injury**

10 To plead antitrust injury, Defendants must allege that: (1) Plaintiffs’ anticompetitive
 11 conduct (2) causes injury to competition in a definable market. See McGlinchy, 845 F.2d at
 12 812-13 (The “failure to allege injury to competition is a proper ground for dismissal by
 13 judgment on the pleadings.”); Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1433
 14 (9th Cir. 1995) (“To show antitrust injury, a plaintiff must prove that his loss flows from an
 15 anticompetitive aspect or effect of the defendant's behavior, since it is inimical to the
 16 antitrust laws to award damages for losses stemming from acts that do not hurt
 17 competition.”). In other words, “the possession of monopoly power will not be found
 18 unlawful unless it is accompanied by an element of anticompetitive *conduct*.” Verizon
 19 Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004)
 20 (emphasis in original). And the anticompetitive conduct must be alleged to cause “a decrease
 21 in competition in the relevant market.” Seattle Totems Hockey Club, 783 F.2d at 1350. It is
 22 insufficient to plead “that the actions harmed [the claimant] in its capacity as a competitor.”
 23 Id.

24 Defendants have alleged that Plaintiffs have engaged in anticompetitive conduct by:
 25 (a) acquiring competitors, Counterclaims ¶¶ 17; (b) usurping Torrent’s intellectual property,
 26 id. ¶¶ 19-26, 34; (c) filing repetitive and baseless claims against Torrent to drain its

resources, id. ¶¶ 27, 35; (d) extracting unreasonable and unenforceable contracts from employees to prevent competition, id. ¶¶ 18, 28-29; and (e) attempting to obtain Torrent's confidential and proprietary development materials. Id. ¶ 30. Plaintiffs argue that none of these behaviors constitute anticompetitive conduct, and that Defendants have failed to allege the requisite injury to competition in the relevant marketplace with respect to each of these behaviors.

The Court examines each aspect of Plaintiffs' "anti-competitive strategy" to determine whether Defendants have sufficiently alleged "antitrust injury." The Court requires more than the sweeping legal conclusion that Fiserv/NFS's anticompetitive conduct has caused injury to competition in the relevant market, see Counterclaims ¶¶ 31, 33, 40, 42, 47, 49, 52, 56, to overcome Plaintiffs' motion to dismiss for failure to state a claim. See Les Shockley Racing v. Nat'l Hot Rod Ass'n, 884 F.2d 504, 507-08 (9th Cir. 1989) (noting that "a section one claimant may not merely recite the bare legal conclusion that competition has been restrained unreasonably" but rather "must, at a minimum, sketch the outline of the antitrust violation with allegations of supporting factual detail"); Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 735-36 (9th Cir. 1987) (affirming 12(b)(6) dismissal because complaint merely alleged bare legal conclusions) (quoting Car Carriers v. Ford Motor Co., 745 F.2d 1101, 1108 (7th Cir. 1984)). To survive a FED. R. CIV. P. 12(b)(6) motion to dismiss, Defendants must "allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws." Cost Mgmt. Servs., 99 F.3d at 950.

i. Acquiring Competitors

Based upon Defendants' representation that "Torrent does not challenge the acquisitions, standing alone, as antitrust violations," see Defs.' Resp. at 21, the Court does not consider Plaintiffs' acquisitions of competitors, see Counterclaims ¶ 17, as an independent basis for Defendants' Section 2 Counterclaims II and III.

ii. **Usurping Torrent's Intellectual Property**

Defendants allege that part of Plaintiffs' anticompetitive strategy is Plaintiffs' "attempt to usurp ownership of Torrent's intellectual property," namely the copyright in the "Executive Summary" authored by Pine. Counterclaims ¶¶ 19-21. Plaintiffs argue that their registration of a copyright for the "Executive Summary" and their enforcement of the copyright are immune from antitrust liability under the Noerr-Pennington doctrine, *see Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) ("Noerr"), *Mine Workers v. Pennington*, 381 U.S. 657 (1965) ("Pennington"), and *Professional Real Estate Investors, Inc. v. Columbia Pictures*, 508 U.S. 49 (1993) ("PRE").

The registration of a copyright is a governmental action taken by the United States Copyright Office at the request of a private party. In Noerr, the United States Supreme Court stated that "it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out." Noerr, 365 U.S. at 136. However, Noerr does not apply where a fraud has been alleged. *See Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982) ("[T]he fraudulent furnishing of false information to an agency in connection with an adjudicatory proceeding can be the basis for antitrust liability, if the requisite predatory intent is present and the other elements of an antitrust claim are proven."). For the purposes of this motion, the Court takes Defendants' allegations, as to the fraud committed upon the United States Copyright Office by Plaintiffs, as true. Thus, Plaintiffs' fraudulent registration of the copyright is not immune from antitrust liability under the Noerr-Pennington doctrine.

The issue then is whether Defendants have sufficiently alleged an antitrust injury caused by Plaintiffs' copyright registration of the "Executive Summary." Defendants allege that Fiserv/NFS has never used the copyrighted work. Counterclaims ¶ 24. Furthermore, Defendants allege that Fiserv/NFS's primary purpose in procuring the copyright was to

1 create a basis for a copyright claim against Torrent in this lawsuit and to deny Defendants
 2 their lawful right to register the document. Id. ¶¶ 21, 24. If Plaintiffs have never used the
 3 copyrighted work, it is untenable that the copyright registration could have caused a decrease
 4 in competition in the relevant flood vendor market. Defendants can prove no set of facts
 5 consistent with these allegations that would entitle them to relief under Section 2 of the
 6 Sherman Act. Accordingly, the Court rejects Plaintiffs' copyright registration of the
 7 "Executive Summary" as a basis for Defendants' Section 2 Counterclaims II and III.

8 The enforcement of the copyrighted "Executive Summary" is part of Plaintiffs'
 9 lawsuit against Defendants. Am. Compl., ¶¶ 78-86 (alleged facts regarding the "Executive
 10 Summary"), 166-178 (Plaintiffs' copyright infringement claim against Defendants). Parties
 11 who petition the government for redress are generally immune from antitrust liability. See
 12 Noerr, 365 U.S. at 135-143; Pennington, 381 U.S. at 669. The Noerr-Pennington doctrine
 13 has been extended to include immunity for parties petitioning the courts. California Motor
 14 Transport Co. v. Trucking Unlimited, 404 U.S. 508, 509-11 (1972). However, if a party is
 15 bringing suit simply as a "sham" to harm its competitors, then the litigation activities can be
 16 considered antitrust activity. See PRE, 508 U.S. at 56-61; California Motor Transport, 404
 17 U.S. at 512. PRE sets up a two-part test for the sham litigation exception to Noerr immunity:

18 First, the lawsuit must be objectively baseless in the sense that no reasonable
 19 litigant could realistically expect success on the merits. If an objective litigant
 20 could conclude that the suit is reasonably calculated to elicit a favorable
 21 outcome, the suit is immunized under Noerr, and an antitrust claim premised
 22 on the sham exception must fail. Only if the challenged litigation is
 23 objectively meritless may a court examine the litigant's subjective motivation.

24 PRE, 508 U.S. at 60; see also Liberty Lake Invs., Inc. v. Magnuson, 12 F.3d 155, 157 (9th
 25 Cir. 1993).

26 As previously mentioned, the Court takes Defendants' allegations, as to the fraud
 committed upon the United States Copyright Office by Plaintiffs, as true. Thus, for the
 purposes of this motion, Plaintiffs' copyright infringement claim must be considered

1 objectively baseless under PRE. Plaintiffs' enforcement of the allegedly fraudulently-
2 obtained copyright is not immune from antitrust liability under the Noerr-Pennington
3 doctrine.

4 The issue then is whether Defendants have sufficiently alleged an antitrust injury
5 caused by Plaintiffs' copyright infringement action against Defendants. Defendants allege
6 that Plaintiffs' "attempt to enforce a copyright actually owned by Torrent" is "an effort to
7 prevent Torrent from describing and promoting its business – and to prevent competition in
8 the marketplace generally." Counterclaims ¶ 19. Defendants further allege that "Fiserv/NFS
9 is improperly trying to prevent Torrent, and others, from entering the flood insurance vendor
10 market . . . through an aggressive and overreaching attempt to enforce an invalid and
11 improperly-obtained copyright." Id. ¶ 26. These allegations do not assert that any injury to
12 competition has occurred, merely that that is the intent of Plaintiffs' action. Moreover, no
13 set of facts could support an allegation of injury to competition because the "Executive
14 Summary" pertains specifically to Torrent; the "Executive Summary" describes Torrent's
15 business model and Torrent's planned technology. Counterclaims ¶¶ 19-21; Am. Compl. Ex.
16 N; Answer, docket no. 9, ¶ 80. Furthermore, Plaintiffs bring their copyright claim against
17 Defendants only, not against any "other" potential competitors of Fiserv/NFS. Antitrust laws
18 were enacted for "the protection of competition, not competitors." Brown Shoe Co. v.
19 United States, 370 U.S. 294, 320 (1962); see also McGlinchy, 845 F.2d at 812 ("The
20 elimination of a single competitor, without more, does not prove anticompetitive effect.").
21 Accordingly, the Court rejects Plaintiffs' copyright enforcement action against Defendants as
22 a basis for Defendants' Section 2 Counterclaims II and III.

23 **iii. Filing Repetitive and Baseless Claims Against Torrent**

24 Defendants allege that part of Plaintiffs' anticompetitive strategy is Plaintiffs' filing of
25 "repetitive and baseless claims" against Torrent "in an effort to drain Torrent of economic
26 resources." Counterclaims ¶ 27. Defendants specifically complain about a lawsuit filed by

1 Plaintiffs in King County Superior Court, about the present lawsuit in federal court, and
2 about Plaintiffs' registration of the copyright for the "Executive Summary." Id. ¶¶ 27, 35.
3 Defendants did not expressly allege that Fiserv/NFS's litigation has been a "sham;" however,
4 the Court resolves any doubts in favor of the pleader and construes Defendants' allegations
5 that Plaintiffs have "filed repetitive and baseless claims" as an allegation of "sham"
6 litigation.

7 Defendants ask the Court to view the two lawsuits, coupled with Plaintiffs' fraudulent
8 copyright registration, as a whole. Defs.' Resp. at 17. The Court has had the opportunity to
9 become intimately familiar with some of Plaintiffs' claims in the present lawsuit through
10 Defendants' motion for partial summary judgment, docket no. 23, and concludes that the
11 present lawsuit is not "objectively baseless." PRE, 508 U.S. at 60. Accordingly, Plaintiffs'
12 alleged "repetitive and baseless claims" are immune from antitrust liability under the Noerr-
13 Pennington doctrine. Even if Plaintiffs' "repetitive and baseless claims" were not immune,
14 Defendants have failed to allege the requisite antitrust injury caused by Plaintiffs' claims.
15 See Counterclaims ¶¶ 27, 35 (alleging injury only to Defendants, not to competition in the
16 relevant market). For both of these reasons, the Court rejects Plaintiffs' "repetitive and
17 baseless claims" as a basis for Defendants' Section 2 Counterclaims II and III.

18 **iv. Extracting Unreasonable and Unenforceable Contracts**
19 **from Employees**

20 Defendants allege that the Confidentiality Agreement, a non-disclosure agreement,
21 and the Option Agreement, which includes non-solicitation and/or non-compete provisions,
22 are "anti-competitive agreements." Counterclaims ¶¶ 18, 28-29. Plaintiffs argue that non-
23 disclosure agreements do not injure competition as a matter of law. See IDX Systems Corp.
24 v. Epic Systems Corp., 285 F.3d 581, 585 (7th Cir. 2002) (stating non-disclosure agreements
25 "protect intellectual property without affecting competition" and that "[n]othing in the
26 antitrust laws gives one producer a right to sponge off another's intellectual property").

1 Defendants basically concede this statement of law. Defs.' Resp. at 9 ("[T]hat nondisclosure
2 agreements are subject to a lower level of antitrust scrutiny . . . is more or less true, as far as
3 it goes"). Defendants thereafter solely refer to the Option Agreement as the basis for their
4 antitrust counterclaims. Thus, the Court rejects the Confidentiality Agreement as a basis for
5 Defendants' Section 2 Counterclaims II and III and focuses on whether Defendants have
6 sufficiently alleged that the Option Agreement has caused an "antitrust injury." Defendants
7 have failed to allege that competition in the relevant market has been injured as a result of
8 the Option Agreement (or "anti-competitive agreements," as the Option Agreement is more
9 generally referred to in the Counterclaims). See Counterclaims ¶¶ 18, 28-29. Accordingly,
10 the Court rejects the "anti-competitive agreements" as a basis for Defendants' Section 2
11 Counterclaims II and III.

12 v. **Attempting to Obtain Torrent's Confidential and**
13 **Proprietary Development Materials**

14 Defendants allege that part of Plaintiffs' anticompetitive strategy is Plaintiffs'
15 "demand[] that Torrent hand over to Fiserv/NFS all of Torrent's proprietary development
16 materials." Counterclaims ¶ 30. Plaintiffs' motion to dismiss argues that it is not
17 "anticompetitive conduct" for NFS to have made requests to inspect Torrent's alleged
18 "confidential" and "proprietary" information in demand letters prior to the filing of any suit
19 and as part of discovery during the prior state court proceedings. Pls.' Mot. at 20. Plaintiffs
20 argue that Fiserv/NFS's discovery requests and demand letters are immune from antitrust
21 liability under the Noerr-Pennington doctrine. Id. Defendants failed to respond to Plaintiffs'
22 argument. Defendants' failure to respond is considered by the Court as an admission that the
23 argument has merit. See Local Rule CR 7(b)(2). Accordingly, the Court rejects Plaintiffs'
24 requests for information – as part of pre-litigation conduct and, subsequently, as part of
25 discovery – as a basis for Defendants' Section 2 Counterclaims II and III.

1 **b. Conclusion (Counterclaims II and III)**

2 Defendants failed to sufficiently allege the “antitrust injury” element of their Section
3 2 “monopolization” and “attempt to monopolize” Sherman Act claims. Thus, the Court
4 GRANTED Plaintiffs’ motion to dismiss Defendants’ Counterclaims II and III for failure to
5 state a claim upon which relief can be granted.

6 **C. State Laws (Counterclaim IV)**

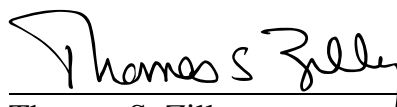
7 Defendants’ Counterclaim IV alleges violations of Wisconsin, Montana and
8 Washington antitrust, monopolization, unfair competition, and restraint of trade laws. To
9 make a claim under any of the asserted state laws, Defendants must plead antitrust injury
10 (i.e., injury to *competition*). See, e.g., State of Washington v. Black, 100 Wn.2d 793, 802-03
11 (1984) (recognizing that under RCW 19.86 “acts or practices which are reasonable business
12 practices or which are not injurious to the public are not the kinds of acts sought to be
13 prohibited.”); Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 61 (1987) (“Injury and damages
14 are essential elements of an antitrust action.”); Bizzle v. Northern Mont. Health Care, Inc.,
15 1999 Mont. Dist. LEXIS 1136 at * 5 (Aug. 4, 1999) (“to prevail in his claim plaintiff must
16 show defendants intended to harm competition and actually did injure competition”); Conley
17 Publ’g Group Ltd. v. Journal Communications, Inc., 265 Wis. 2d 128, 140 (2003)
18 (“Wisconsin courts have followed federal court interpretations of Sections 1 and 2 of the
19 Sherman Act and have construed Wisconsin antitrust statutes in conformity with these
20 federal court interpretations.”). The state claims fail because Defendants have failed to
21 allege antitrust injury. Accordingly, the Court GRANTED Plaintiffs’ motion to dismiss
22 Defendants’ Counterclaim IV for failure to state a claim upon which relief can be granted.

23 **IV. CONCLUSION**

24 For the reasons outlined above, the Court GRANTED Plaintiffs’ Motion to Dismiss
25 Counterclaims I-IV, docket no. 14. The Court DISMISSED Defendants’ Counterclaims I-IV
26 without prejudice.

1 IT IS SO ORDERED.

2 DATED this 25th day of May, 2006.

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5 Thomas S. Zilly
6 United States District Judge
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